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No. 03-1693

IN THE

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal-size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

PARTIES

The Petitioners consist of McCreary County, Kentucky, and Jimmie Greene as County Judge Executive of McCreary County, and Pulaski County, Kentucky, and Darrell BeShears, as County Judge Executive of Pulaski County. Although Jimmie Greene and Darrell BeShears are referred to as "Judge Executive," they are neither lawyers nor judges. The title "Judge Executive" is given to the chief elected administrative official for each county. The Petitioners will be individually referred to as "McCreary" or "Pulaski" or collectively as "courthouses" or "Petitioners."

The Respondents include the American Civil Liberties Union of Kentucky, Louanne Walker and Dave Howe as residents of McCreary County, and Lawrence Durham and Paul Lee as citizens of Pulaski County. The Respondents will be referred to collectively as "Respondents" or "ACLU."

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JURISDICTION

The judgment of the Court of Appeals was rendered on December 18, 2003. Rehearing *en banc* was denied on March 23, 2004. A Petition for Writ of Certiorari was filed on June 21, 2004, which this Court granted on October 12, 2004. Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Establishment Clause of the First Amendment to the United States Constitution which states, in part, "Congress shall make no law respecting an establishment of religion...."

STATEMENT OF THE CASE

On November 18, 1999, three separate complaints were filed against McCreary and Pulaski Counties and the Harlan

County School District.[1] The complaints challenged displays in the McCreary and Pulaski courthouses consisting of a privately donated, framed copy of the Ten Commandments. PA 6a. Before any hearing, Petitioners posted additional donated documents. PA 7a . This display consisted of the Ten Commandments along with other historical documents. PA 7a. Most of the documents were included in their entirety, but the Declaration of Independence and message from President Lincoln were excerpted. *Id.* The District Court ordered their removal and directed that no similar displays be erected. PA 8a, 137a-138a, 161a-162a.

Petitioners filed a motion to clarify the orders to determine whether any of the documents could ever be re-posted. PA 4a. The court denied the motion, stating that "the injunction speaks for itself." *Id.*[2] Assuming the displays could be modified, Petitioners changed them. ("Foundations Display," "Display" or "Displays"). The Foundations Display contained the entire text of nine documents and a document entitled "The Foundations of American Law and Government." ("Foundations Document"). The documents are in eleven equal-size frames.[3] The Foundations Document

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[1]Harlan's Petition is being held and is not before this Court.

[2]The court later stated that the order barring "no similar displays" was unclear. *See* "Appendix" entry in Joint Appendix 46, at 220. ("JA").

[3]The Display includes: (1) The Declaration of Independence; (2) The Star-Spangled Banner; (3) The Mayflower Compact; (4) The Bill of Rights; (5) The Magna Carta (contained in two equal frames due to its length); (6) The National Motto in the seal of the United States; (7) The Preamble to the Kentucky Constitution; (8) The Ten Commandments; (9) A picture of Lady Justice; and (10) The Foundations Document frame explaining each of the documents in the Display. PA 177a-212a. The

states, in part, that the "display contains documents that played a significant role in the foundation of our system of law and government." PA 10a, 60a, 206a. Both Judge Executives testified that the Display "is educational in nature, and is intended to reflect a sampling of documents that played a significant role in the development of the legal and governmental system of the United States." JA 57, 62. In part, the Foundations Document states that the Mayflower Compact was the "first written constitution in the New World." PA 179a. The Declaration of Independence is "[p]erhaps the single most important document in American history," standing for the proposition of unalienable rights. PA 180a. The Magna Carta brought King John and England's "future rulers within the rule of law." PA, 181a. The Bill of Rights is said to be a "powerful force in American Government, shaping our laws and serving as a check on the exercise of government power." PA 183a. The Star-Spangled Banner "became a rallying cry for the American Patriots during the Revolutionary War." PA 182a. The Preamble to the Kentucky Constitution stands for the proposition that government is not a "giver of rights" and its power derives from the "consent of the people." PA 183a. "Lady Justice is a symbol of the American system of justice and the ideals it embodies." *Id.* The Ten Commandments "influenced the formation of Western legal thought and the formation of our country." PA 180a.

None of the documents are set apart or have any greater prominence than any other document. PA 60a, 177a, 178a.

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posted Ten Commandments document does not make any reference the Scriptural text or translation version. *See* "Notice of Filing Regarding Historical Displays." JA 15 #56.

All the frames are of equal size. The Ten Commandments is only one of eleven frames. *Id.* Each courthouse contains numerous other historical documents *in addition* to the Foundations Display. In McCreary, there are 58 historical documents posted in the Executive's office, 41 in the waiting room, 124 in the side entrance to the courthouse, 33 in the fiscal courtroom, and 28 in the conference room. As part of the 200th anniversary in 1999, Pulaski added numerous historical documents in the Executive's office, in the lobby, in the side entrance to the courthouse, in the fiscal courtroom, and in the conference room. JA 1 #5 at 6; 28 #6 at 6-7. The Foundations Display is in the lobby hallway of both courthouses, not in the courtroom or any other official place of business. *Id.*

The District Court enjoined the Foundations Display and ordered that the Ten Commandments be removed. PA 113a-114a. A divided panel of the Sixth Circuit affirmed. PA 1a-95a. Two judges found the Foundations Display violated the purpose prong of *Lemon v. Kurtzman,* 403 U.S. 602 (1971). PA 16a-42a. The judge who wrote the opinion commented on the effects prong, but no one joined him. PA 51a. Judge Ryan would have upheld the display under the purpose and effects prongs. PA 52a-95a. The majority held that the content of the Display did nothing to detract from the "religious" nature of the Ten Commandments because the Display did not demonstrate an "analytical or historical connection with the other documents." PA 27a-34a. The court held the context of the Display was "religious" because the Ten Commandments is "blatantly religious" and is an "active," not a "passive symbol" of religion. PA 35a. The court also held that the prior displays created an "unconstitutional taint." PA 41a-42a.

The Sixth Circuit denied rehearing *en banc*, with the judge who wrote the majority opinion concurring and two judges dissenting, in which they pointed out that the decision conflicted with precedent of this Court and the Sixth Circuit. PA 163a-176a. The dissent wrote that no court has ever required an "analytical or historical connection" and that the history of the Display is entitled to "considerably less weight than the majority gives it." PA 172a-175a. The dissent rejected the novel "theory of indelible, unconstitutional 'taint,'" noting that, "We have explicitly rejected the idea that the government's past unconstitutional conduct forever taints its actions in the future." PA 83a-84a.

SUMMARY OF THE ARGUMENT

The Foundations Display passes every test developed by this Court. Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the secular purpose is to educate the public about some of the "documents that played a significant role in the foundations of our system of law and government." The mere presence of the Ten Commandments does not transform the otherwise secular Display into a religious one. The Sixth Circuit erroneously demanded some "demonstrated analytical or historical connection" with the other documents. That the Display is about law and that the Decalogue is law and has influenced American law should be sufficient. The Display is not meant to debate American history, nor is its purpose to present a treatise on law. Petitioners' purpose is to educate about law, and that purpose is secular, not religious.

Although the Sixth Circuit agreed that the Foundations Display does not emphasize the Ten Commandments, it faulted the placement of them with legal documents. The

court below erred by finding the Commandments to be an "active symbol of religion" that converts a secular display into a religious one. The majority also erred by holding that the prior displays tainted the Foundations Display. If the prior displays were devoid of a secular purpose, which Petitioners deny, the Foundations Display clearly is not. If government missteps on an Establishment land mine, it should be allowed to correct itself. The Foundations Display is most relevant to purpose. The Display is about law, not religion.

No reasonable observer would consider the Foundations Display an endorsement of religion. Such an observer, aware of the historical influence of the Ten Commandments, would view them in context with the other legal documents. Being only one of eleven documents in a display on law and viewed in light of history and ubiquity, no objective observer would conclude the Display favors or establishes religion.

The Display passes the test in *Marsh v Chambers*, 463 U.S. 783 (1983). Government use of and reliance upon the Ten Commandments runs from Colonial times to the present. They have influenced the development of American law. The drafters of the First Amendment would not have conceived that the Establishment Clause would require the removal of a passive display like the one before this Court.

The Display also passes the coercion test in *Lee v. Weisman*, 505 U.S. 577 (1992). Viewing a passive Display that includes the Decalogue is not an overt religious exercise. Onlookers are primarily adults who may avert their glance and freely pass. Passersby are not compelled to participate in a religious exercise, nor are they coerced to view the Display.

Although the Display passes the *Lemon* test, this Court should overrule or modify the test. At a minimum, the purpose prong should be abandoned. It focuses too much on subjective motives when the focus should be on the objective effects of an activity. This Court should adopt a new test for government acknowledgments of religion. Justice O'Connor's proposed test in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2322 (O'Connor, J., concurring), is a starting point. Each factor should be carefully considered to avert another *Lemon*. "History and ubiquity" are important factors to include. The "absence of worship or prayer" factor may be difficult to apply because dividing speech from worship is fraught with problems. The "nonsectarian consideration" is workable so long as context is considered, as in the creche and menorah cases. Caution must be exercised so that the "minimal religious content" factor does not lead to word counts. Perhaps the test should include some element of coercion, being understood as compulsion. At any rate, the Display passes every test, including all aspects of Justice O'Connor's proposed test. Whatever the test, it should respect our religious heritage by distinguishing between real establishments and permissible acknowledgments of religion.

ARGUMENT

I. THE FOUNDATIONS DISPLAY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A. The Foundations Display Passes The *Lemon* Test.

Although *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has caused confusion, the Foundations Display satisfies the *Lemon* test. In *Lynch v. Donnelly*, 465 U.S. 668, 687-94

(1984)(O'Connor, J., concurring) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the *Lemon* test was refined into the "endorsement" test and narrowed to the purpose and effects prongs. The purpose test focuses on the subjective intent of the government speaker and the effects on the objective meaning of the statement to a reasonable observer. *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). The purpose prong asks "whether government's actual purpose is to endorse or disapprove of religion," and the effects prong asks "whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval" of religion. *Id.*[4]

1. The Display has a secular purpose.

A challenged activity will be invalidated only if it is "*entirely* motivated by a purpose to advance religion."[5] "Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated." *Lynch*,

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[4]The entanglement prong has been subsumed into the effects prong and is concerned with "institutional" entanglement. The "political divisiveness" inquiry only applied to school funding cases, but has been discarded by cases post *Aguilar v. Felton*, 473 U.S. 402 (1985). *See Lynch*, 465 U.S. at 687-89 (O'Connor, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002); *Mitchell v. Helms*, 530 U.S. 793, 825-26 (2000)(plurality).

[5]*Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)(emphasis added); *see also Bowen v. Kendrick*, 487 U.S. 589, 602 (1988)(same); *Lynch*, 465 U.S. at 680 (same). An activity will satisfy the purpose prong even if it is "motivated in part by a religious purpose." *Wallace*, 472 U.S. at 56. "A religious purpose alone is not enough to invalidate an [activity]." *Edwards v. Aguilard*, 482 U.S. 578, 599 (1987)(Powell, J., concurring).

465 U.S. at 681 n.6. Courts should be "deferential" to any "articulation of a secular purpose," especially where "a legislature expresses a plausible secular purpose," unless it is insincere or a "sham."[6] Petitioners' stated purpose to educate the public about some of the "documents that played a significant role in the foundation of our system of law and government" is a legitimate secular purpose and clearly not a sham. PA 18a, 179a. As Judge Ryan noted, a "sham" means a fraud, a hoax or an intentional deception. PA 74a. There is no such evidence in this record. The purpose as expressed in the Foundations Document and the testimony of both Judge Executives that the Display is "educational in nature" is undisputed. PA 179a; JA 57, 62. The Display is intended to reflect a sampling of documents that played a significant role in the development of the legal and governmental system of the United States." JA 57, 62.

The court below veered astray when analyzing the content, setting, and past history. The court erroneously held that the Display lacked a "demonstrated analytical or historical connection" between the Ten Commandments and the other documents. PA 27, 29a. For content, the court focused on portions of two sentences in the Foundations Document. The majority contorted the text to say that "the Ten Commandments profoundly influenced the drafting of the Declaration of Independence," PA 29a, when it actually states that the Ten Commandments "influenced the formation of Western legal thought and the formation of our country." The influence of the Ten Commandments on Western legal

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[6]*Edwards*, 482 U.S. at 586-87; *Wallace*, 472 U.S. at 74 (O'Connor, J., concurring). *See also Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (where there is a "plausible" secular purpose, it will be accepted).

thought is seen in the Declaration's statement about "unalienable rights" "endowed" by the "Creator." The text then states that the Ten Commandments provide the "moral background" of the Declaration and the "foundation of our law." PA 180a. The text nowhere claims that the Ten Commandments influenced Thomas Jefferson or the drafting of the Declaration. The discussion about whether Jefferson's views were heterodox is pointless.[7] However, that the Ten Commandments influenced American law and government can hardly be questioned.

Whether those who posted the Foundations Display were accurate regarding the role of the Ten Commandments in American law is irrelevant to their purpose. So long as the government is sincere in its purpose, it need not be accurate. Accuracy has never been a component of purpose. Courts are "obviously not required to determine whether the secular purpose is morally or politically correct - because the government acts neutrally so long as the purpose is one other than advancing religion." *ACLU v. Mercer County*, 219 F. Supp. 2d 777, 784-85 (E.D. Ky. 2003). That two members of the Sixth Circuit disagree with the historical proposition that the Decalogue influenced American law is not determinative of Petitioners' purpose. Nor does purpose depend on the posting of a historical treatise near the Display. Whether two jurists are unable to perceive a "demonstrated analytical connection" between the Decalogue and law is beside the point. Petitioners' purpose is not to debate historians but to

[7]Commands regarding murder, property, theft, coveting, marriage, rest from labor and honoring parents are compatible with the rights to life, liberty and happiness. This does not mean that the Declaration relied on the Decalogue, nor does the Display make such a claim.

post a Display about law. Regardless of whether someone disagrees with it, Petitioners' purpose is sincere and legitimate. The purpose is not fabricated. Many historical and legal scholars agree that the Decalogue influenced American law. The fact that some may differ does not transform Petitioners' secular purpose into a religious one. The Display is about law, not religion. The Ten Commandments are law and have influenced American law. The purpose of the Display is to educate about some of the documents that influenced law and government. That purpose is secular. The Decalogue is at home with other legal documents. Its presence does not transform a secular Display into a religious one.[8]

[8]*See City of Elkhart v. Books*, 121 S. Ct. 2209, 2211-12 (2001) (Rehnquist, C.J., dissenting from denial of certiorari)("substantial contribution to secular legal codes" and played a "role in the development of our legal system"); *County of Allegheny*, 492 U.S. at 562 (Stevens, J., concurring in part, dissenting in part)(Moses holding the Ten Commandments with other lawgivers); *Edwards*, 482 U.S. at 593-94 (Decalogue played a secular role in Western civilization); *Lynch*, 465 U.S. at 677-78 (1984)(describing Moses with the Decalogue in this Court, noting "our history is pervaded by expressions of religious beliefs"); *Stone v. Graham*, 449 U.S. 39, 45 (1980)(Rehnquist, J., dissenting)(the Decalogue has "had a significant impact on the development of secular legal codes of the Western World"); *Griswold v. Connecticut*, 381 U.S. 479, 529 n.2 (1965)(Stewart, J., dissenting)(most criminal laws coincide with the Decalogue); *McGowan v. Maryland*, 366 U.S. 420, 462 (1961)(Frankfurter, J., concurring)("Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions of murder, theft and adultery reinforce commands of the decalogue."); *Van Orden v. Perry*, 351 F.3d 173, 181 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2004)(influenced "ethics and a just society"); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973)("historically important ... with both secular and sectarian effects"); *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000), *cert. denied*, 532 U.S. 1958 (2001)("played a role in the secular development of our society"); *Mercer County*, 219 F. Supp. 2d at 784 (influenced "our

Regarding context, the opinion admits "the displays did not provide undue physical emphasis on the Ten Commandments," but the Display was faulted for "sandwiching" the Commandments, which the court called an "active symbol of religion," in with the other documents. PA 35a. How the Decalogue can be an "active" symbol of religion when a creche is not is baffling.[9] The Ten Commandments no more convert the other documents into a religious display than the creche makes Santa Claus a disciple of Christ. As Justice Stevens noted, placing Moses and the Ten Commandments as the "only adornment on a courtroom wall" conveys an "equivocal message," with other select *religious* leaders an impermissible message, and with other *lawgivers* a "respect not for great proselytizers but for great lawgivers." *County of Allegheny*, 492 U.S. at 652-53 (Stevens, J., concurring in part, dissenting in part).

The opinion in *Stone* did not hold that the displays of the Ten Commandments are always religious but that the "purpose for posting" them in a classroom in that case was religious. 449 U.S. at 41. If the Decalogue were solely religious, its mere presence alongside secular legal documents

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common law" and a "court of law may not change history.").

[9]The creche is "the chief symbol" of the "Christian belief" in "a divine Savior," *Lynch*, 465 U.S. at 708 (Brennan, J., dissenting), yet this Court called the "creche, like a painting," a "passive" symbol. *Lynch*, 465 U.S. at 685. Religious symbols are "passive." *County of Allegheny*, 492 U.S. at 662-63, 664 (Kennedy, J., concurring in part, dissenting in part). Religious tax exemptions, which require some "state involvement with religion," are likewise "passive." *Walz v. Tax Comm'n*, 397 U.S. 664, 691 (1970). A Ten Commandments display or monument is also "passive." *Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting).

does not equate to a religious purpose for the Display. The creche in *Lynch* was religious, but the purpose of the display was secular. *See* 465 U.S. at 668. Although the Ten Commandments have a religious origin, they may be "integrated into the school curriculum," taught to youngsters in a captive setting, *Id.* at 42, and have "a secular application."[10]

The majority used the prior displays to "taint" the Foundations Display. Yet, the argument that an alleged religious purpose always taints a subsequent purpose that is substantially secular must fail. The Foundations Display is unlike any prior display. The Foundations Display clearly is not devoid of a secular purpose. Even if Petitioners were deemed to have begun with a wholly religious purpose, they did not end with one. The Foundations Display itself is more relevant to purpose than shadows of the past, and it clearly reflects a secular purpose.

If the opinions of this Court give jurists "blurred" vision to "dimly" perceive permissible Establishment Clause lines, then they certainly will affect elected officials' vision of constitutionality, entitling them to some grace in trying to negotiate the territory.[11] In the constitutional minefield established by *Lemon*, where the line bends and curves, ebbs and flows, generating numerous pluralities, surely courts must

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[10]*Books*, 121 S. Ct. at 2211 (Rehnquist, C.J., dissenting from denial of certiorari). *See School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1962)(the Bible may be taught in school when "presented objectively as part of a secular program of education").

[11]*See, e.g., Mitchell*, 530 U.S. at 807; *Lynch*, 465 U.S. at 679; *Lemon*, 403 U.S. at 612.

allow government officials to correct their conduct. One misstep cannot forever haunt the future. The Third, Sixth, and Seventh Circuits have permitted government officials to modify the purposes for a Good Friday holiday, a display that began with only a creche, and displays of the Ten Commandments.[12] Even if some officials began with religious motives, evidence of which is absent from this record, the focus must center on the purpose of the *current* Display. Motives do not equal purpose. Sunday laws "were motivated by religious forces," *McGowan*, 366 U.S. at 431, and "unquestionably religious in purpose," *Id.* at 466-69, 487 (Frankfurter, J., concurring), yet were upheld because over time they accumulated secular purposes. Officials originally "decreed a Sunday day of rest for the impermissible purpose of supporting religion," but the laws were upheld because government "abandoned that purpose and retained the laws for the permissible purpose of furthering overwhelmingly secular ends." *Walz*, 397 U.S. at 688 n.8 (Brennan, J., concurring). *See also Schempp*, 374 U.S. at 263-64.[13]

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[12] *See Adland v. Russ*, 307 F.3d 471, 489-90 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003)(Ten Commandments); *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir. 1999)(Good Friday); *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999)(Creche); *Books*, 235 F.3d at 307-08 (Ten Commandments); *Metzl v. Leininger*, 57 F.3d 618, 623-24 (7th Cir. 1995)(Good Friday). *See also Freethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003)(the current purpose of a Ten Commandments display is more relevant than the original purpose).

[13] *See Board of Educ. v. Mergens*, 496 U.S. 226, 249 (1990)("motives of legislators" are irrelevant); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2325 (2004)(O'Connor, J., concurring)(motives for adding "under God" in Pledge cannot, on their own, determine purpose); *Wallace v. Jaffree*, 472 U.S. 38, 77 (1985)(O'Connor, J., concurring)("little, if any, weight" should be given to intent of legislators);

The Sixth Circuit's reliance on *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), is misplaced. *Santa Fe* does not stand for the proposition that the past taints future actions. In that case, all four policies provided students with only one choice. *Id.* at 296-98. The fourth policy remained a "prayer only" policy. *Id.* at 298, 306, 315. The person designated to speak was the *same* student voted on under the prior "prayer only" policy. *Id.* at 298 n.5, 309. The school district "viewed the [fourth] policy simply as a continuation of the previous policies ... as illustrated by the fact that the school did not conduct a new election...." *Id.* at 309. The fourth policy *on its face* failed the purpose prong because "*the text ... alone* reveals that it has an unconstitutional purpose." *Id.* at 315 (emphasis added); *see also id.* at 307 n.21, 314..

In contrast to *Santa Fe*, the District Court acknowledged that the Foundations Display "differs ... fundamentally from the other one." JA 46 at 220. Anyone acquainted with the modification of the displays must agree. The Foundations Document explains that the Display "contains documents that played a significant role in the foundation of our system of law and government." PA 179a. This statement, combined with the eleven equal-size frames (not to mention scores of other historical pictures and displays on the courthouse walls), emphasizes the secular purpose of the *entire* Display.

Although this case illustrates why the purpose prong should be abandoned, the Foundations Display passes the test.

McGowan, 366 U.S. at 466-67, 469 (Frankfurter, J., concurring)(courts cannot "psychoanalyze legislators").

The Display presents the permissible secular purpose of educating the public about some of the documents that influenced American law and government. Nothing in the Display, nor its past history, evinces a religious purpose, let alone a *wholly* religious purpose. The contrary holding under the purpose prong should be reversed.

2. The display does not endorse religion.

The Sixth Circuit decided the case under the purpose prong, but Judge Clay ventured alone into the effects prong.[14] This brief will therefore address whether a reasonable observer would view the Foundations Display as conveying a message of endorsement or approval of religion. The reasonable observer is "fully aware of our national history," is "more informed than the casual passerby," does not allow personal feelings to cloud judgment, is aware of "general history," including the scores of other historical and legal pictures and documents on display in the courthouses, has some knowledge of constitutional law, and understands "the government can acknowledge the role of religion in our society in numerous ways that do not amount to endorsement."[15]

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[14]Judge Gibbons joined Judge Clay on the purpose prong, but expressed "no opinion" on the effects prong. PA 51a. Judge Ryan dissented and would have upheld the Display under both prongs. PA 52a -95a.

[15]*Newdow*, 124 S. Ct. at 2322-23 (O'Connor, J., concurring); *Capitol Sq. Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-81 (1995)(O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring)(emphasis omitted);*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 348-49 (1987) (O'Connor, J., concurring)(must be aware of accommodation under the Free Exercise Clause); *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring)(same).

Under the endorsement test, the "'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates" the challenged action. *County of Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring). Both the creche and the menorah in *County of Allegheny* were sectarian, but the creche without secular symbols was deemed sectarian while the menorah with secular symbols was not. "'Although the religious and indeed sectarian significance' of the menorah 'is not neutralized by the setting,' this particular physical setting 'changes what viewers may fairly understand to be the purpose of the display - as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.'" *Id.* at 635 (quoting *Lynch*, 465 U.S. at 692)(O'Connor, J., concurring)). The same was true of the Pawtucket creche, the "chief symbol" of the "Christian religion," when accompanied by secular symbols, because the display, rather than endorsing religion in general, or Christianity in particular, celebrated a public holiday. This was true despite the fact that the creche is an exclusive symbol of Christianity, its sectarian significance was "not neutralized" by the display, it was a significant part of the display, the display was "celebratory not instructional," "the city did nothing to counteract any possible religious message," and the "government was understood to place its imprimatur on the religious content of the creche." *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring). These facts did not add up to a religious purpose. "[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. ... [The question] in large

part [is] a legal question to be answered on the basis of judicial interpretation of social facts." *Id.* at 693-94.

The Sixth Circuit erred by finding a religious purpose, and one judge a religious effect. The focus must not zoom in on the Ten Commandments in isolation from history and context. If the focus centered on the "religious component of any activity," then our religious heritage would be erased. *Lynch*, 465 U.S. at 680. "Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part, dissenting in part). In *Lynch*, the creche was the *predominant* part of the display. There the creche captured the viewer's attention, but a panoramic scan also took in the surrounding secular symbols. Like the error committed by the lower court in *Lynch*, Judge Clay focused "almost exclusively" on the Ten Commandments. *See Lynch*, 465 U.S. at 680. When viewed as a whole, the Ten Commandments is on a wall, accompanied by ten other identical frames, in the midst of thousands of words with the secular explanation in the Foundations Document, and in a courthouse with scores of other historical and legal pictures and displays. The theme is stated in the Foundations Document as a depiction of some documents that influenced American law and government. The reasonable observer would be aware of numerous legal and historical displays in the courthouses *in addition* to the Foundations Display: 284 displays in McCreary and scores of displays in Pulaski, the number of which grew in 1999 to

commemorate the County's 200th anniversary.[16]

Placing a microscope on any one document, or portion thereof, is an obvious mistake. Parsing the Magna Carta reveals it discriminates against Jews in lending money and considers women of less value than men; the Declaration of Independence quarrels with standing armies, an accepted modern reality. Hammurabi adorns the walls of this Court, but that does not translate into support of the death penalty for thieves, which his Code condones.[17] In the same way the Foundations Display does not promote discrimination or advocate disarmament, it does not endorse religion.[18]

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[16] *See* Pulaski County History, *available at* <http://www.pulaskicountygovt.org/history.htm> (discussing some history of the courthouse)(last visited December 2, 2004).

[17] *See* (PA 202a ¶¶ 10-11, 208a ¶ 54); James Pritchard, 1The Ancient Near East 139 ¶ 6, 141 ¶ 22 (1958). This Code allegedly was given to Hammurabi by the sun-god, Shamash.

[18] The different versions argument misses the point. The text is virtually the same in substance, no matter the version. The minor differences are constitutionally insignificant because the focus is not on the Decalogue as a *theological* document but on the *entire* Display. The reasonable observer is not a professor in Hebraic studies. A creche is sectarian. It is not generic. It divides society into two halves – Christian and non-Christian. Yet, when the focus is on the *overall* display as in *Lynch*, it is the display as a *whole*, not the religious symbol in *particular*, that the viewer perceives. It is irrelevant that a Nativity scene is sectarian or displayed on December 25 rather than January 6, the day the birth of Christ is celebrated by some Christians, because the religious symbol alone does not determine endorsement; history and context do. This Court rejected an argument based on *Larson v. Valente*, 456 U.S. 228 (1982), that a religious symbol, like a creche, which "is identified with one religious faith," discriminates among sects. *See Lynch*, 465 U.S. at 685, 687 n.13.

Unlike the creche, which is solely sectarian, the Ten Commandments has both religious and secular aspects. On its face, the commands about honoring parents, murder, adultery, theft, bearing false witness and coveting are secular and universal. The Sabbath command partakes of both secular and religious aspects - worship and resting from labor.[19] Only a few commands refer to God. Thus, on its face, the Ten Commandments frame contains more secular than religious language. Like the other secular documents in the Display, the Ten Commandments is presented in its entirety except for a few words. Had Petitioners excerpted only the secular portion of the Decalogue, that action would evince hostility rather than neutrality toward religion. *See Zelman*, 536 U.S. at 669 (O'Connor, J., concurring)(the state must be neutral, not an "adversary"); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 114 (2001)(discussing neutrality). It is the Ten Commandments, not the "several commandments," that influenced American law.[20]

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[19]This Court upheld Sunday labor laws despite their religious origin, the religious motivation for the laws, and the continued use of (1) "Lord's day," (2) "Sabbath," (3) provisions prohibiting "profanation," restricting labor near churches, and exempting some activities only in the afternoon after worship service times, because, in the context of history, these laws also had developed secular reasons for their existence. *See McGowan*, 366 U.S. at 445; *see also id.* at 462-504 (Frankfurter, J., concurring).

[20]Senior Judge Noonan of the Ninth Circuit wrote that the Ten Commandments "have been the most influential law code in history." John T. Noonan, Jr., The Believer and the Powers that Are: Cases, History, and Other Data Bearing on the Relation of Religion and Government 4 (1987); *see also* John Witte, Jr. and Harold J. Berman, The Transformation of Western Legal Philosophy in Lutheran Germany, 62 S. Cal. L. Rev. 1573-1660 (1989)(detailing how the Ten Commandments were used in the formation of the modern state); Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition 65 (1983).

The Foundations Display does not focus on the Ten Commandments. It is a display consisting of some documents that influenced American law and government, of which the Decalogue constitutes only one frame. A reasonable observer does not suffer from tunnel vision. Such an observer takes in the entire Display, reads that the Display is about law - not religion, is aware of the numerous other documents in the courthouse, and has some basic understanding of history and our religious heritage. A reasonable observer could not possibly conclude that the Foundations Display as a whole endorses religion.

Unlike Christmas, which did not emerge as a widespread celebration until "well into the nineteenth century" and did not become a national holiday until 1870, *Lynch*, 465 U.S. at 720-23 (Brennan, J., dissenting), the secular use and influence of the Ten Commandments was brought to America by her first explorers. From Colonial times to the present, their influence has permeated our American way of life.

Throughout history, courts and legislatures have referred to the Decalogue and its impact on our laws. This Court has recognized the influence the Ten Commandments has had on our system of law and government.[21] This Court's chambers are "decorated with a notable and permanent - not seasonal - symbol of religion: Moses with Ten Commandments." *Lynch*, 465 U.S. at 677. The Ten Commandments have been

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[21]*See Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting)("the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World."). *See also* footnote 8.

repeatedly used by government from the inception of America. Their use in the present context is no more offensive to the Constitution than the creche in *Lynch*, the menorah in *County of Allegheny*, legislative prayers in *Marsh*, or a host of other ceremonial and public acknowledgments of religion.[22]

As noted above, the Ten Commandments must be viewed in its entirety and as part of the larger Foundations Display. It must be viewed in context. But even if a court were erroneously to focus on the Decalogue, contrary to the clear teaching of this Court in *Lynch* and elsewhere, there would be no endorsement. Each commandment played some significant role in the foundation of our system of law and government. Twelve of the thirteen original colonies adopted the entire Decalogue into their civil and criminal laws. Rhode Island adopted most, but not all, of the Ten Commandments.[23] Volumes of statutory and case law have been written on the subject. The following is a brief overview of their influence, most of which a reasonable observer would appreciate.

In 1610, Virginia adopted the commandment about having "no other gods" by requiring its leaders to give "allegiance" to God "from whom all power and authority is derived," and who is the "King of kings, the Commander of commanders,

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[22]*See, e.g., County of Allegheny*, 492 U.S. at 573; *Lynch*, 365 U.S. at 688; *Marsh v. Chambers*, 463 U.S. 783 (1983).

[23]*See generally* Joseph Story, 3 Commentaries on the Constitution of the United States, §1867 (1833)(stating each colony was influenced by Christianity); Colonial Origins of the American Constitution: A Documentary History (Donald S. Lutz, ed., 1998). ("Colonial Origins").

and Lord of hosts."[24] In 1641, Massachusetts adopted a law that banned the worship of "any other god but the Lord God...."[25] Whether these and other laws discussed herein would currently pass constitutional muster is irrelevant to the question whether the Foundations Display reflects the *history* of law in this nation. Almost every state constitution refers to God, and many states have mottos that refer to God, like the National Motto.[26] Ethical monotheism flows from this commandment and is interwoven in the fabric of the Western legal tradition by supporting the proposition that a unitary god created all people and elevated each one to moral dignity.[27]

In 1680, the New Hampshire colony enacted a law prohibiting "idolatry" or the "worship of any other god but the

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[24]*Articles, Laws, and Orders, Divine, Politic and Martial for the Colony of Virginia*, *reprinted in* Colonial Origins at 315-16.

[25]Massachusetts Body of Liberties (1641), *reprinted in* The Colonial Laws of Massachusetts at 33 (W. H. Whitmore, 1890).

[26]*See Newdow*, 124 S. Ct. at 2322 n.1 (O'Connor, J., concurring); *ACLU v. Capital Sq. Review and Advisory Bd.*, 243 F.3d 289, 296 n.6 (6th Cir. 2001)(en banc); *Rector v. Church of the Holy Trinity*, 143 U.S. 457, 468 (1892).

[27]Ruben Alvarado roots two great principles of liberty in the monotheism of Israel: the triumph of laws over men, and participation of the ruled in government. He asserts that the basis of all future progress toward free society is rooted in the Decalogue and Israel's monotheism. The Decalogue influenced "civil constitutions," and its monotheism "founds a civil society." *See* Alvarado, A Common Law: The Law of Nations and Western Civilization 17-18 (1999)(citing and quoting 19th Century German historian Leopold von Ranke, 1 Weltgeschichte 43 (1928)). Monotheism effectuates one supreme law conferring rights and responsibilities from a unitary authority higher than government.

Lord God."[28] The commandment regarding profaning God's name was adopted by Virginia in 1610 ("That no man blaspheme God's holy name") and by Connecticut in 1639 ("If any person shall blaspheme the name of God"), explained by the Maine Supreme Court in 1921, and traced by the Florida Supreme Court in 1944 back to the Decalogue.[29] This Court upheld the disposition of a will *only* after determining that the devise for a secular college did not profane Christianity.[30]

In upholding Sunday closing laws, this Court acknowledged their origin in the Decalogue. *See McGowan*, 366 U.S. at 437-45. In his exhaustive concurrence, Justice Frankfurter traced the origins of these laws from Mount Sinai to the present, citing several hundred statutes and court decisions. *Id.* at 462-504 (Frankfurter, J., concurring). The influence of the Decalogue is seen in the U.S. Constitution

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[28]*General Laws and Liberties of New Hampshire 1680, reprinted in* Colonial Origins at 6.

[29]*See* Colonial Origins at 316; The Code of 1650 at 28-29. *See State v. Mockus*, 113 A. 39, 42 (Me. 1921)(discussing profanation); *Cason v. Baskin*, 20 So.2d 243, 247 (Fla. 1944)(en banc)("These decisions doubtless hark back to the third Commandment of the decalogue: 'Thou shalt not take the name of the Lord thy God in vain.'").

[30]*See Vidal v. Executors of Girard*, 43 U.S. 127 (1844). In *People v. Ruggles*, 8 Johns 290 (N.Y. Sup. Ct. 1811), Chief Judge Kent upheld a conviction of profaning God, stating that "the morality of the country is deeply ingrafted upon christianity." *See also Updegraph v. Commonwealth*, 11 Serg. & Rawle, 394 (Penn. 1824)(upholding profanation conviction, stating laws regarding the "Lord's day," perjury, adultery and others were founded upon Christianity and that Christianity "is and always has been a part of the common law of Pennsylvania.").

which prohibits a law from taking effect on Sunday.[31] Although hundreds of court opinions could be cited, the declaration by the Pennsylvania Supreme Court sums up the discussion in reference to the Sabbath commandment: "This divine pronouncement became part of the Common Law inherited by the thirteen American colonies and by the sovereign States of the American union."[32] Sunday labor laws are inexplicable without the Decalogue.[33]

A 1642 Connecticut law cited to the Ten Commandments for the proposition that children should honor their parents.[34] The Louisiana Court of Appeals stated: "'Honor thy father

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[31]*McGowan*, 366 U.S. at 452 n.22 ("The Constitution itself provided for a Sunday exception in the calculation of the ten days for a presidential veto."). *See also Missouri v. Chicago B. & Q. R. Co.*, 143 S.W. 785, 803 (Mo. 1912) (referring to a similar clause, "The framers of the [Missouri] Constitution, then, recognized Sunday as a day to be observed.").

[32]*Bertera's Hopewell Foodland, Inc. v. Masters*, 236 A.2d 197, 200-01 (Pa. 1967). *See* Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 Albany L. Rev. 675 (2000).

[33]The Sabbath commandment illustrates why courts should not hyper-focus on particular words in isolation from the context and overall meaning. Read literally, this commandment has nothing to do with Sunday. The actual Sabbath is Saturday, the seventh day of the week - not Sunday, the first day. The Sabbath commandment was applied to Sunday by the Emperor Constantine when he adopted Christianity. *See McGowan*, 366 U.S. at 565 (Douglas, J., dissenting). Sunday for most Christians became equated with the Sabbath. The point is that a myopic focus on words, religious aspects of the Decalogue, or minor variations in the text or numbering of the commands misses the mark. The Foundations Display is about law, and the Decalogue is only one part of the Display.

[34]*See* The Code of 1650 at 29; *see also* Colonial Origins at 230.

and thy mother,' is as much a command of the municipal law as it is a part of the Decalogue...."[35] Citations to the commandment prohibiting the taking of human life would fill volumes. A Kentucky court stated that "all forms of governments following the promulgation of Moses at Mt. Sinai [have] required of each and every one of its citizens that 'Thou shalt not murder.'"[36] One court quoting another declared: "Virtually all criminal laws are in one way or another the progeny of Judeo-Christian ethics. We have no intention to overrule the Ten Commandments."[37]

In a typical Colonial law, Massachusetts in 1641 prohibited adultery as did Connecticut in 1642, Rhode Island in 1647, New Hampshire in 1680 and Pennsylvania in 1705.[38] A Texas court declared, "Thou shalt not commit adultery is our law as well as the law of the Bible," and the Washington Supreme Court stated that adultery "violates one of the Ten Commandments and the statutes of this State."[39]

References to the commandment prohibiting theft are too

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[35] *Ruiz v. Clancy*, 157 So. 737, 738 (La. Ct. App. 1934). *See also Pierce v. Yerkovich*, 363 N.Y.S.2d 403, 414 (N.Y. Fam. Ct. 1974); *Mileski v. Locker*, 178 N.Y.S.2d 911, 916 (N.Y. Sup. Ct. 1958); *Beaty v. McGoldrick*, 121 N.Y.S.2d 431, 432 (N.Y. Sup. Ct. 1953).

[36] *Young v. Kentucky*, 53 S.W. 963, 966 (Ky. 1932).

[37] *Wisconsin v. Schultz*, 582 N.W.2d 113, 117 (Wis. App. 1998)(quoting *Sumpter v. Indiana*, 306 N.E.2d 95, 101 (Ind. 1974)).

[38] Colonial Origins at 84.

[39] *See Hardin v. Texas*, 46 S.W. 803, 808 (Tex. Crim. App. 1898); *Schreifels v. Schreifels*, 287 P.2d 1001, 1005 (Wash. 1955).

numerous to trace. Not only have laws against theft been derived from this commandment, but also laws protecting the integrity of elections, and (according to some courts) the U.S. Constitution's Takings Clause.[40] The commandment about bearing "false witness" became the foundation of our judicial system. Connecticut enacted a perjury law in 1642, and similar laws declaring their basis in the Decalogue were enacted by Massachusetts in 1641, Rhode Island in 1647, and New Hampshire in 1680.[41] In 1924, the Oregon Supreme Court stated, "'Thou shalt not bear false witness' is a command of the Decalogue, and that forbidden act is denounced by the statute as a felony."[42]

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[40] *See Hollywood Motion Picture Equip. Co. v. Furer*, 105 P.2d 299, 301(Cal. 1940)(theft); *Pennsylvania Co. v. United States*, 214 F. 445, 455 (W.D. Pa. 1914) (Takings Clause); *Doll v. Bender*, 47 S.E. 293, 300 (W.Va. 1904)(Dent, J., concurring)(elections). *See also Succession of Onorato*, 51 So.2d 804, 810 (La. 1951)("In the Ten Commandments, the basic law of all Christian countries, is found the admonition 'Thou shalt not steal.' This prohibition against the taking of the property of another is a natural law."); *Missouri v. Gould*, 46 S.W.2d 886, 889-90 (Mo. 1932)("When the Supreme Law Giver delivered the Ten Commandments to Moses, on Mt. Sinai, He embraced all offenses, wherein one person unjustly enriches himself at the expense of his neighbor, under the one simple commandment, 'Thou shalt not steal.'"); *Addison v. Florida*, 116 So. 629 (Fla. 1928)(larceny); *De Rinzie v. Colorado*, 138 P. 1009, 1010 (Colo. 1913)(burglary and larceny); *Utah v. Donaldson*, 99 P. 447, 449 (Utah 1909)(larceny).

[41] *See* The Code of 1650 at 28-29; *see also* Colonial Origins at 7, 84, 88, 190-91, 230.

[42] *See Watts v. Gerking*, 228 P. 135, 141 (Or. 1924); *see also Hosford v. Mississippi*, 525 So.2d 789, 799 (Miss. 1998); *Anderson v. Maddox*, 65 So.2d 299, 301-02 (Fla. 1953)(Terrell, J., concurring specially)("'Thou shalt not steal' and 'thou shalt not bear false witness' are just as new as they were when Moses brought them down from the Mountain.").

John Adams stated, "If 'Thou shalt not covet' and 'Thou shalt not steal' were not commandments of Heaven, they must be made inviolable precepts in every society before it can be civilized or made free."[43] The commandment against coveting has been cited as the basis of civil laws against defamation, election fraud, white collar crime, and cattle rustling.[44]

One would have to rewrite history to conclude that the Ten Commandments played an insignificant role in American law. The imprint of the Decalogue on the development of Western law is undeniable, and on American law is indisputable. In 1950, the Florida Supreme Court declared:

> A people unschooled about the sovereignty of God, the Ten Commandments, and the ethics of Jesus, could never have evolved the Bill of Rights, the Declaration of Independence, and the Constitution. There is not one solitary fundamental principle of our democratic policy that did not stem directly from the basic moral concepts as embodied in the Decalogue.[45]

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[43] John Adams, 4 The Works of John Adams, Second President of the United States 9 (Francis Adams, ed. 1851).

[44] *See Weinstock, Lubin & Co. v. Marks*, 42 P. 142, 145 (Cal. 1895)(defamation); *Doll v. Bender*, 47 S.E. 293, 300-01 (W.Va. 1904)(Dent, J., concurring)(election fraud); *Chisman v. Moylan*, 105 So. 2d 186, 189 (Fla. App. 1958)(white collar crime); *Swift & Co. v. Peterson*, 233 P.2d 216, 231 (Or. 1951)(cattle rustling).

[45] *Florida v. City of Tampa*, 48 So. 2d 78, 79 (Fla. 1950); *see also Commissioners of Johnston County v. Lacy*, 93 S.E. 482, 487 (N.C. 1917)("Our laws are founded upon the Decalogue"). John Quincy Adams, the sixth president, stated, "The law given on Sinai was a civil and municipal as well as a moral and religious code." John Quincy Adams, Letters of John Quincy Adams, to His Son, on the Bible and Its Teachings 61 (James M. Alden, ed., 1850).

To see the original Constitution and Declaration of Independence, one must first view the Ten Commandments at the entrances to the National Archives. Moses occupies the central position facing the Speaker in the United States House Chamber. Moses and the Ten Commandments appear five times in this Court, and twice Moses and the Decalogue occupy center stage.[46]

Among the myriad of documents on the walls of the McCreary and Pulaski courthouses, the Ten Commandments consists of only one frame. Viewed in its entirety and with the understanding of history, a reasonable observer would not conclude that the Ten Commandments, as one small portion of the Foundations Display on law, is an establishment of religion. The Decalogue played a significant role in the foundation of American law and may be constitutionally displayed for that reason. Any other conclusion would require erasing our shared American heritage.

B. The Foundations Display Passes The *Marsh* Test.

The *Marsh* test is similar to the "history and ubiquity" analysis under the endorsement test. In *Marsh v Chambers*,

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[46] *See* Symbols of Law Information Sheet at 2, *available at* <http://www.supremecourtus.gov/about/symbolsoflaw.pdf> (last visited December 2, 2004)("Throughout the history of western art, tablets have been used to signify 'the Law.' This tradition is closely associated with Moses, the Hebrew lawgiver, who according to the Book of Exodus descended from Mount Sinai with two stone tablets inscribed with the Ten Commandments"). *See also Lynch*, 465 U.S. at 677.

463 U.S. 783 (1983), this Court upheld legislative prayers, never mentioning *Lemon*. After chronicling history back to the debates on the Constitution and Bill of Rights, this Court concluded that such prayers were permissible since the same statesmen, on the same day they agreed on the language of the First Amendment, authorized Congress to pay a chaplain to open each session with prayer. *Id.* at 786-91. Contemporaneous actions taken by those who framed the First Amendment are "weighty evidence" of its intent. *Id.* at 790 (citation omitted). The Court noted that adults are primarily involved in hearing such prayers and they are "'not readily susceptible to religious indoctrination' or peer pressure." *Id.* at 792 (citations omitted). The Court rejected the argument that the clergyman presiding over the Nebraska assembly was "of only one denomination," namely Presbyterian, and had been so for sixteen years. *Id.* at 793. Finding that compensating the chaplain with public funds did not alter the conclusion, the Court stressed that its job was to distinguish "real threat from mere shadow." *Id.* at 795 (citation omitted). The longstanding practice provided "abundant assurance that there is no real threat 'while this Court sits.'" *Id.* at 795 (citation omitted).

Like legislative prayers, government use of and reliance upon the Ten Commandments pre and postdates the First Amendment. James Madison, whose influence on the First Amendment is sometimes cited by this Court,[47] did not

[47]*See e.g., Lee v. Weisman*, 505 U.S. 577, 590 (1992); *Edwards*, 482 U.S. 578, 605 (1987)(Powell, J. and O'Connor, J., concurring); *Walz*, 397, U.S. at 675 n.3, 684; *Engel v. Vitale*, 370 U.S. 421; *Everson v. Board of Educ.*, 330 U.S. 1, 11-15 (1947); *but see Wallace*, 472 U.S. at 92-111 (Rehnquist, J., dissenting)(questioning Madison's influence since he thought the Bill of Rights to be unnecessary).

consider the Sabbath commandment to be an infringement on conscience or a step toward establishment. He and Jefferson chose to enforce it as a matter of civil law.[48] As with legislative prayers, the framers of the First Amendment had no intention to make government acknowledgments of the Ten Commandments unconstitutional.

Whereas the prayers were offered daily in the legislature in *Marsh*, the Foundations Display here is silently posted on a wall for the infrequent passerby to see. To do business that may affect one's life or livelihood, the legislator whose presence is required, and the citizen who may need to appear, must listen every day to a state-sponsored prayer. In contrast, both citizens and staff in the courthouses may breeze by the Foundations Display without a second thought, with no gavel to call attention to a religious exercise and with no voice to intrude on thoughts or conversation.

Like legislative prayers, the Display does "not urge citizens to engage in religious practices...." *County of Allegheny*, 492 U.S. at 603 n.52. The Display is more analogous to a museum than a church, expresses general appreciation for law rather than dogma, affects no one's political standing, and compels no one to confess belief or

[48]*McGowan*, 366 U.S. at 437-38. Following Madison's Memorial and Remonstrance Against Religious Assessments, Virginia's Declaration of Rights, and the passage of a bill to repeal all laws establishing religion in the Commonwealth, the Sunday law legislation, based on the Sabbath commandment, remained in effect and was reenacted. Both Jefferson and Madison supported "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers" which passed in 1786. "Apparently neither Thomas Jefferson nor James Madison regarded it as repugnant to religious freedom." *Id.* at 494-95 (Frankfurter, J., concurring).

disbelief. "*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings." *Id.* at 670 (Kennedy, J., concurring in part, dissenting in part). History is a great tutor and it teaches us that enacting laws which coincide with the Ten Commandments or displaying passive symbols of the Decalogue, especially in the context of law as in this case, has neither established nor tended to establish religion.

C. The Foundations Display Passes The *Lee* Test.

The majority in *Lee v. Weisman*, 505 U.S. 577 (1992), found it unnecessary to "revisit difficult questions dividing" the Court which *Lemon* had generated. *Id.* at 586. *Lee* found unconstitutional coercion in the context of school-sponsored, state-controlled prayer in primary and secondary schools. Noting that "government may not coerce anyone to support or participate in religion or its exercise" or to act in a way that establishes a state religion, or tends to do so, the Court found that public school officials compelled young students to participate in "an overt religious exercise." *Id.* at 587-88. School officials placed prayer on the agenda, selected the clergy, directed him to follow guidelines on how to pray, and created an environment where students felt coerced to attend. The holding in *Marsh* was distinguished because of the "differences" between public schools and legislative sessions. The former involves youth compelled to attend one of the most important life events; the latter concerns adults who are

free to come and go. *Lee*, 505 U.S. at 597.[49]

Justices of this Court have indicated at various times that coercion is part of the Free Exercise Clause but not the Establishment Clause, have discussed coercion as though it is part of the Establishment Clause, or have stated that coercion alone is insufficient.[50] Under any version of the coercion test,

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[49]The majority of this Court does not appear to have adopted an indirect "coercion only" test. Justice Blackmun, joined by Justices Stevens and O'Connor, concurred on the basis of *Lemon*, noting that proof of coercion is unnecessary. *Id.* at 604. Justice Souter, joined by Justices Stevens and O'Connor, concurred, noting the force of some coercion arguments but expressing hesitance in a coercion-only test. *Id.* at 618. Justice Scalia, joined by Chief Justice Rehnquist, and Justices White and Thomas, dissented, noting that the "coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Id.* at 640. The dissenters saw no warrant for expanding coercion beyond "acts backed by threat of penalty." *Id.* at 642.

[50]Not part of Establishment Clause: *Lee*, 505 U.S. at 604 (Blackmun, J., concurring); *Id.* at 619 (Souter, J., concurring); *County of Allegheny*, 492 U.S. at 597 n.47; *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 221 (1963)(apparently rejecting coercion but then discussing "indirect coercion"); *Engel*, 370 U.S. at 431 (same); Discussing coercion: *Newdow*, 124 S. Ct. at 2320 n.4 (Rehnquist, C.J., concurring) (distinguishing between compulsion in *Barnette* and coercion in *Lee*); *Id.* at 2327 (O'Connor, J., concurring); *Id.* at 2328-31 (Thomas, J., concurring); *Good News*, 533 U.S. at 121 (Scalia, J., concurring); *Mitchell*, 530 U.S. at 870-71 (Souter, J., dissenting); *Santa Fe*, 530 U.S. at 587; *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 719 (1994)(O'Connor, J., concurring in part); *Mergens*, 496 U.S. at 261 (Kennedy, J., concurring in part); *County of Allegheny*, 492 U.S. at 657-63 (Kennedy, J., concurring in part, dissenting in part); *Wallace*, 472 U.S. at 60 n.51; *Zorach v. Clauson*, 343 U.S. 306, 311-14 (1952); *Id.* at 321 (Frankfurter, J., dissenting); Coercion insufficient by itself: *County of Allegheny*, 492 U.S. at 627-28 (O'Connor, J., concurring

force or threat of penalty, indirect or psychological, the Foundations Display passes the test. *Lee* involved an "overt religious exercise," which a passive Display is not.[51] Unlike *Lee*, the onlookers here are primarily adults, able to avert their glance and free to pass. They are not compelled to attend, nor are they compelled to view the Display. If they happen to see it, they likely have had the experience of touring a public museum where they see some things they like and some they dislike. If unimpressed by one Display, they pass on to the many other pictures and displays. They need not modify their behavior. They are not taxed, penalized, or made to feel like outsiders. Their standing in the community is unaffected, and there is no hint that the Display has any tendency to establish religion. The Establishment Clause should not be used to brush aside shadows. The Foundations Display passes every test created by this Court.

II. THE *LEMON* TEST SHOULD BE OVERRULED OR MODIFIED, AT LEAST FOR GOVERNMENTAL ACKNOWLEDGMENTS OF RELIGION.

That the Establishment Clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has caused "hopeless confusion" is no surprise, as many members of this Court have voiced opposition to its continued use.[52] *Lemon* is not

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in part).

[51] *Lee*, 505 U.S. at 587-88; *Newdow*, 124 S. Ct. at 2320 n.4 (Rehnquist, C.J., concurring).

[52] *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting)("checkered history"); *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000)(Scalia, J., dissenting from denial of certiorari)(would grant certiorari to "inter the *Lemon* test"); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751 (1994)(Scalia, J., dissenting)("meaningless"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (Scalia, J., concurring)("stalks our Establishment Clause jurisprudence"); *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985)(O'Connor, J., concurring)("should be reexamined and refined"); *Id.* at 91 (White, J., dissenting); *Id.* at 110-11 (Rehnquist, J., dissenting)(*Lemon* has spawned "unworkable plurality opinions," "consistent unpredictability" and "unprincipled results"); *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (Stevens, J., dissenting)(requires "sisyphean task" to apply the test).

solely to blame for the infamous three-part test because it merely stated what this Court had previously done.[53] Nevertheless, the chaos caused by *Lemon* led Justice Kennedy to state: "Substantial revision of our Establishment Clause doctrine may be in order...." *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989)(Kennedy, J., concurring in part, dissenting in part).

This Court acknowledged that there is no "rigid caliper" or "single test" and that *Lemon* was only meant as a "guideline."[54] Yet, the "guideline" continues to overshadow Establishment Clause jurisprudence. The *Lemon* test should

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[53] The purpose and effects of a government activity were first mentioned in *McGowan v. Maryland*, 366 U.S. 420, 443, 445 (1961), *Schempp*, 374 U.S. at 222, and *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968). The entanglement prong was first announced in *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

[54] *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2322 (O'Connor, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 885 (2000)(Souter, J., dissenting); *Santa Fe*, 530 U.S. at 319 (Rehnquist, C.J., dissenting); *Wallace*, 472 U.S. at 86 (Burger, C.J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

be abandoned. It has fractured this Court and caused scholars and litigators to wonder if there is any hope for consistency. There are as many conflicting decisions on virtually identical fact patterns as there are judges to decide them. Thankfully, *Lemon* has gradually wasted away with age. The prongs have been trimmed. *Lemon* is often ignored,[55] and when invoked, its unworkable tests cause fragmentation in every courthouse in America. The time has come to do away with the *Lemon* test. However, if this Court is not willing to jettison *Lemon*, then substantial revision is necessary. As the political divisiveness consideration has been discarded and the entanglement prong subsumed into the effects prong and limited to institutional entanglement, the purpose prong, *at a minimum*, should be abandoned. If the *Lemon* test is bad, the purpose prong is worse.

The Sixth Circuit opinion illustrates the absurdity of the purpose prong. The court found an improper purpose because the Decalogue, the majority wrote, is "predominantly religious" and out of place with legal and historical documents. The court equated motives with purpose, assumed a religious motivation for the prior displays, and superimposed this alleged motive on the Foundations Display. This flawed reasoning was spawned by the purpose prong. As Justice Scalia, joined by Chief Justice Rehnquist, remarked,

> Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause

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[55]*See e.g., Grumet*, 512 U.S. at 687; *Zobrest*, 509 U.S. 1 (1993); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982); *Lee v. Weisman*, 505 U.S. 577 (1992); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

> that even the most conscientious government official can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which of course is unconstitutional.

Edwards v. Aguilard, 482 U.S. 578, 636 (1987)(Scalia, J., dissenting).

The purpose prong is not "a proper interpretation of the Constitution," has "no basis in the history" of the First Amendment, "has proven mercurial in application," and should be "abandoned." *Id.* at 615, 640; *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting). The purpose "prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus the constitutionality of a statute may depend upon what legislators put into the legislative history and, more importantly, what they leave out." *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting). Either astute or mute legislators can pass the purpose prong, while others not so savvy will flunk the test, when both intend to achieve the same goal. This flaw in the purpose prong has led some members of this Court to question the relevance of legislative motives. *See* footnote 13.

Aside from this case, two cases cited in the Petition further illustrate the problem with the purpose prong. Pet. at 28. The cases of *ACLU v. Mercer County*, 240 F. Supp. 2d 623 (E.D. Ky. 2003)(appeal pending), and *ACLU v. Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002)(temporarily stayed), have virtually identical displays as before this Court. In *Rutherford County*, the Court struck down the display under the purpose prong but went on to write that it passed the effects prong. The reasoning was that several years prior to the placement of the display a group of county commissioners passed a resolution directing that a single copy of the Ten Commandments be erected. Although this resolution was never acted upon and later repealed, this act alone was found to taint any future acts by the county. In *Mercer County*, the display passed both the purpose and effects prong. In that case there was no prior legislative activity to shed light on the purpose other than the display itself. These divergent rulings mean that the same display is unconstitutional in one building but constitutional in a building across the street because of either past history, statements of some officials, or pure silence. If motives matter, then whose motives? Do we look to the sponsor, some members of the legislative body, letters to government officials by concerned citizens, or some past misstep? If motives matter, then can good motives make a bad act constitutional? Can improper motives make a good law bad? How long do motives and past actions haunt the future? Must we wait almost 200 years for the religious motives that birthed Sunday laws to fade away?

These questions cannot workably be answered until the purpose prong is abandoned. In this case, the actual Foundations Display is most relevant. The objective effects

matter far more than subjective motives. This Court should reverse the decision below and abandon, or significantly modify, the *Lemon* test.

III. AN OBJECTIVE TEST SHOULD BE ADOPTED FOR GOVERNMENT ACKNOWLEDGMENTS OF RELIGION.

"Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751 (1994)(O'Connor, J., concurring in part).[56] Justice O'Connor has suggested four preliminary categories: (1) government action targeted at particular individuals or groups, (2) government (acknowledgment or) speech on religious topics, (3) government decisions involving religious doctrine and religious law, and (4) governmental delegations of power to religious bodies. *See Grumet*, 512 U.S. at 720. Perhaps government funding could be another category. However, creating too many tests could become confusing.

Caution is required for any test since a "bad test may drive out the good." *Id.* Any test is only as good as the Establishment Clause theory it purports to apply. If the theory is bad, the test will be bad. Tests also have a way of curbing

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[56] *See also Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2321 (2004)(O'Connor, J., concurring); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 852 (1995)(O'Connor, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 885 (2000)(Souter, J., dissenting)(citing *Grumet*, 512 U.S. at 751); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984)(no "single test or criterion")(citing cases).

critical thinking. Describing a test as a "guideline" does not solve the problem, because a "guideline" may be used only when convenient. Multiple tests could tend to fragment attempts to create a unifying theme of Establishment Clause jurisprudence. However, multiple Free Speech or Equal Protection tests have not eliminated general unifying themes for both Clauses. The fact is, there are different standards and concerns with funding cases, church property or employment disputes, and government acknowledgments of religion. Establishment Clause concerns are more heightened in the former two than the latter. Government funding of religious activities or judicial inquiry into church practices to resolve property or personnel matters are far more likely to create Establishment Clause concerns than "under God" in the Pledge, "In God We Trust" on our currency, or the passive Displays here that include the Ten Commandments. Any test must strive to separate a real threat from a harmless shadow, an establishment of religion from an acknowledgment.

Justice O'Connor's acknowledgment test set forth in *Newdow*, 124 S. Ct. 2301, may provide a helpful starting point for the development of a new test. The first part of this proposed test focuses on "history and ubiquity." The meaning of ubiquity in this context is not the dictionary meaning of "omnipresent" or "everywhere at the same time" but a practice "observed by enough persons" to warrant the term. *Id.* at 2323. Ubiquity may be less helpful than history. Every practice has had small beginnings, and some practices create new arrangements based on old traditions. Each Presidential invocation of God is both new and old. State mottos, constitutional preambles, the Pledge of Allegiance, and creche displays began at a point in history. Christmas did not begin as a widely celebrated holiday, but it has become so. Pressing

ubiquity too much would mean creches were once impermissible but are now permissible because more people celebrate Christmas. At an extreme, an established church could become permissible because most people have acted in a way over time to establish religion.

Ubiquity seems helpful primarily to the extent it illuminates one of the two aspects of history: historical meaning and historical tutelage. The latter looks at historical practices to distinguish between mere shadows and real threats. History has shown that references to God in our mottos, constitutions, historical documents, and even legislative prayers, have neither established nor tended to establish religion. The presence or lack of controversy seems of less importance. While longstanding practice and the lack of controversy do not give "a vested or protected right" to violate the Constitution, neither does the presence of controversy undercut a constitutional practice. Indeed, litigation can create controversy.[57] If controversy played a significant role, then it would become a "heckler's veto," and Sunday laws and school funding, which have spawned numerous suits, would be doomed.[58] What is relevant, then,

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[57] *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989)(O'Connor, J., concurring)(quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 ("prosecuting a lawsuit" cannot serve to create "divisiveness")(quoting *Aguilar v. Felton*, 473 U.S. 402, 229 (1985)(O'Connor, J., dissenting)).

[58] *Newdow*, 124 S. Ct. at 2320 (Rehnquist, C.J., concurring); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 119 (2001)(refusing to employ "a modified heckler's veto"); *McGowan v. Maryland*, 366 U.S. 420, 435 (1961)("litigation over Sunday closing laws is not novel. Scores of cases may be found in state appellate courts."); *id.* at 527-36 (Frankfurter, J., concurring)(listing cases).

is whether history reveals that a practice has established or tended to establish religion. Historical meaning should seek the best understanding of the Establishment Clause and its purpose. Here there is some agreement, but many differences. Some general assumptions include no established church, no discrimination among sects, and no compelled belief.[59] Despite the divergent opinions beyond these areas, this Court has found historical meaning to be relevant in upholding legislative prayers, property tax exemptions, and creches, noting that "an unbroken practice ... is not something to be lightly cast aside."[60]

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[59]*See, e.g., Newdow*, 124 S. Ct. at 2320 n.4 (Rehnquist, C.J., concurring)(distinguishing between compulsion and coercion); *id.* at 2331 (Thomas, J., concurring); *Good News*, 533 U.S. at 121 (Scalia, J., concurring); *County of Allegheny*, 492 U.S. at 590-91 (summarizing the Establishment Clause); *id.* at 659-63 (Kennedy, J., concurring in part, dissenting in part). *See also* Philip Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 856 (1986); Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986). There seems to be some agreement on direct coercion and less on indirect.

[60]*Newdow*, 124 S. Ct. at 2324 (O'Connor, J., concurring)(quoting *Walz*, 397 U.S. at 678); *Lynch*, 465 U.S. at 668; *Marsh v. Chambers*, 463 U.S. 783 (1983). Although the contributions of James Madison and Thomas Jefferson are relevant, they are not dispositive. Madison was not an ardent proponent of the Bill of Rights, his original draft was not adopted, his opinions shifted later in life, and he acted in ways some members of this Court describe as falling short of his ideals. Jefferson did not participate in drafting or debating the First Amendment. Both supported prohibiting clergy from holding political office and both condoned confiscating church-owned glebe lands, an act possibly understandable then but an extreme separationist position now. *See Lee v. Weisman*, 505 U.S. 577, 624-26 (1992)(Souter, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 91-99 (1985)(Rehnquist, J., dissenting); *McDaniel v. Paty*, 435 U.S. 618, 623 (1977); Mathew D. Staver and Anita L. Staver, *Disestablishmentarianism Collides with the First Amendment: The Ghost of Thomas Jefferson Still Haunts Churches*, 33 Cumberland L. Rev. 43 (2003). *But see* footnote 61.

The Ten Commandments in general, and the Foundations Display in particular, satisfy the history and ubiquity consideration. References to and displays of the Ten Commandments date from Colonial times to the present. In more than 300 years since the Pilgrims landed in America and 213 years since the First Amendment, there have been only 30 reported cases involving the Ten Commandments: the first in 1973, *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th.), *cert. denied*, 414 U.S. 879 (1973); the second was *Stone* in 1980; and 24 since 1999. Litigation strategy designed to make the Ten Commandments a target cannot set aside the Decalogue's longstanding history and ubiquity. When "*illuminated by history,*" the Foundations Display comports with the First Amendment. *Lynch*, 465 U.S. at 678. More importantly, the reality of this history is that passive displays of the Ten Commandments have never tended to establish religion. In the current setting, the Ten Commandments is quite at home with other documents that influenced American law and government.

The Foundations Display also satisfies Justice O'Connor's second consideration – the "absence of worship or prayer." Whether this consideration should receive much weight is debatable. Determining where religious speech ends and worship begins may be tempting but probably not possible. This Court rightly refused to distinguish between speech and worship in *Good News*, 533 U.S. at 111-13, and *Widmar v.*

Vincent, 454 U.S. 263, 271 (1981).[61] The difficulty in making the distinction would likely produce another *Lemon*, not to mention the obvious entanglement problems. At any rate, the cases cited by Justice O'Connor under this consideration primarily deal with young school children in a captive setting, not adults. This Court has made a distinction between coercing young students to pray in a captive environment and prayer where adults may come and go. Passive displays of the Ten Commandments, especially law-based displays like the one before this Court, are no more worship or prayer than the creche or menorah displays upheld by this Court. Viewing the Foundations Display is certainly not a religious exercise.

[61]Some famous historical events included worship and prayer. The cornerstone of the University of Virginia was laid on October 6, 1817, by freemasons in a religious ceremony that was authorized by Thomas Jefferson. *See Letter from Thomas Jefferson to Martha Jefferson Randolph*, (Aug. 31, 1817), *in* The Family Letters of Thomas Jefferson at 418-19 (Edwin M. Betts et al. eds., 1986). Both Jefferson and President James Monroe attended the distinctly religious ceremony, which included three prayers to God and the quotation of portions of Old Testament prophecy taken from Isaiah chapter 28 and Zechariah chapter 3. *See* Chapter 1 of Frank E. Grizzard, Jr., Documentary History of the Construction of the Buildings at the University of Virginia, 1817-1828, (1996)(Ph.D. dissertation, University of Virginia), *available at* <http://etext.lib.virginia.edu/ jefferson/grizzard/> (last visited December 2, 2004). Similar religious ceremonies were conducted for the Washington Monument. *See Construction of the Washington Monument, First Phase 1848-56*, *available at* <http://www.nps.gov/wamo/history/chap2.htm> (last visited December 2, 2004). Jefferson, Madison and other early Presidents attended church services in chambers of Congress, the Supreme Court and the Treasury Building. *See* Library of Congress online exhibit, *Religion and the Founding of the American Republic*, *available at* <http://www.loc.gov/exhibits/religion/rel06-2.html> (last visited December 2, 2004).

The Display also satisfies the third consideration set forth in *Newdow*, namely the Foundations Display is "nonsectarian." Neither the Ten Commandments in particular, nor the Display as a whole, elevate one sect over another. The reference cited by Justice O'Connor here is *Larson v. Valente*, 456 U.S. 228 (1982), a case that dealt with discrimination among religions. This Court has already found that the Sabbath has a secular application and references to God merely acknowledge the historical fact that "we are a religious people" and "[o]ur history is replete with official religious references...." *Lynch*, 465 U.S. at 675 (citation omitted). Since this proposed test is consistent with the endorsement test, the result in *Lynch* would remain the same. There the "chief symbol" of the "Christian religion" was upheld even though its sectarian message was not neutralized. However, the reasonable observer viewing the creche in context and in light of historical tradition did not understand the primary effect of the Display to be an endorsement of religion. *Id.* at 692-94 (O'Connor, J., concurring). The same is true of the Foundations Display.

The Display clearly satisfies the "minimal religious content" consideration. Out of the 8,642 words in the entire Display, of which 1,248 are in the Foundations Document and 199 in the Ten Commandments, the word "God" and "Lord" appear only four times each in the Decalogue, the only document being challenged. Justice O'Connor noted only two of the 31 words of the Pledge were challenged. This amounts to 6.45% of the Pledge. Here, the eight total references to God or Lord make up only 4.02% of the Ten Commandments and an infinitesimal fraction of the entire Display. The problem under this consideration is exactly what just happened, requiring judges to be mathematicians. Stressing the ratio of

religious to secular words could prove to be unworkable and technical. The other factors appear to make this consideration less helpful. At any rate, the Foundations Display passes each consideration.

Perhaps some of the above factors could be supplemented, modified, or replaced by a coercion test. However, the coercion should be more akin to compulsion than to psychological coercion. We are everywhere confronted with governmental acknowledgments. Acknowledgments are far less likely to pose a real threat than other forms of governmental involvement with religion. The Display does not coerce belief or participation in a religious exercise. It is not in the jury room or even the courtroom. In both courts the Display is in the lobby hallway where passersby are not compelled to be. Witnesses or defendants are not compelled to stare at the Display. "Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty." *Id.* The "Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part, dissenting in part). The Display is not obtrusive nor does it proselytize on behalf of a particular religion. *Id.* at 661. It does not "coerce anyone to support or participate in any religion or its exercise" and does not "give direct benefits to a religion in such a degree that it in fact establishes a state religion or tends to do so." *Id.* at 576. "[I]t would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental

exhortation to religiosity that amounts in fact to proselytizing." *Id.* at 569-60. "Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Id.* at 662. "Any coercion that persuades an onlooker [to view the Foundations Display] is inconsequential as an Establishment Clause matter, because such acts are simply not religious in character." *Newdow*, 124 S. Ct. at 2327 (O'Connor, J., concurring). Thus, "symbolic references to religion," like the Display, will pass the coercion test. *Id.* There is neither subtle nor direct coercion at issue with the Foundations Display.

Similar to the Ohio Motto ("With God All Things Are Possible") which the Sixth Circuit upheld, the Display

> does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches. Neither does it impose any religious test as a qualification for holding political office, voting in elections, teaching at a university, or exercising any other right or privilege. And, as far as we can see, its [posting by the courthouses] does not represent a step calculated to lead to any of these prohibited ends.

ACLU of Ohio v. Capitol Sq. Review and Advisory Bd., 243 F.3d 289, 299 (2001)(en banc).

Whatever the test be, it should comport with history and

not wipe away our heritage. The test should not treat passive displays more harshly than this Court's cases addressing governmental funding. The history of religious school and institutional funding cases supports the argument that eleven passive documents, only one of which contains the Ten Commandments, are constitutional. In 1947 this Court in *Everson* issued its oft-repeated statement about the meaning of the Establishment Clause. Although declaring in broad terms that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions...," *Everson* approved government funding for bus transportation of children attending parochial schools. 330 U.S. at 15-18. This Court has declared that the Establishment Clause permits the following government funding of religious activities or education: vouchers, scholarships, bus transportation, books, teaching materials, projectors, onsite training by public school teachers, interpreters, remedial supplemental education, buildings, revenue bonds, and construction grants.[62] This Court has also approved property tax exemptions, a government-funded hospital run by a Roman Catholic order, and suggested that Medicare funds used by sectarian

[62]*See e.g., Zelman*, 536 U.S. at 639 (vouchers); *Mitchell*, 530 U.S. at 793 (educational materials); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)(interpreters); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (counseling); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986)(scholarship); *Mueller v. Allen*, 463 U.S. 388 (1983)(tax deduction for tuition); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976)(grants to private colleges); *Hunt v. McNair*, 413 U.S. 734 (1973)(revenue bonds for college facilities); *Tilton v. Richardson*, 403 U.S. 672 (1971)(grants for college facilities); *Board of Educ. v. Allen*, 392 U.S. 236 (1968)(loan of textbooks).

healthcare providers pose no constitutional problem.[63] Although a guiding principle in government funding cases centers on neutrally available benefits and private choices, the fact remains the result of such, at least indirectly, is that the religious mission of the institution is advanced. In some cases, children who forgo government funding may lose out altogether on obtaining religious benefits. If the Establishment Clause reaches its apex in government funding of sectarian institutions and education and if government may at least fund such indirectly, the result of which is to advance the religious mission, then how much less does a passive Display on law and government containing one religious/secular document not violate the Establishment Clause? If funding cases have not raised the shadow of an established religion, then the Foundations Display will not. Surely this Court is "unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage, long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed."[64]

[63]*See e.g., Zelman*, 536 U.S. at 667-68 (Medicare); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982)(property grant); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)(property tax exemption); *Quick Bear v. Leupp*, 210 U.S. 50 (1908)(treaty and trust funds may be used for religious education); *Braunfield v. Roberts*, 175 U.S. 291 (1899)(religious hospital).

[64]*Lynch*, 465 U.S. at 686. *See also Aguilar v. Felton*, 473 U.S. 402, 419-20 1985)(Burger, C.J., dissenting)("It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation's schoolchildren as textbooks"). The view of Justice Burger, who authored *Lynch*, was later accepted by the majority when *Aguilar* was overruled by *Agostini*, 521

CONCLUSION

The Foundations Display passes every test enunciated by this Court. Whatever test this Court adopts must recognize that an establishment of religion is far different than governmental acknowledgment of religion. The test should include the relevance of historical meaning and tutelage, should comport with the purpose of the First Amendment and should distinguish shadows from real threats. Whether alone or in a contextual display of law as here, the Ten Commandments are part of our history, have not tended to establish a religion, and are consistent with the First Amendment. It is undeniable that the Ten Commandments influenced American law and government. The Foundations Display, which includes the Decalogue, does not violate the Establishment Clause. This Court should reverse, uphold the Foundations Display, abandon or modify the *Lemon* test, and fashion an objective test for acknowledgments of religion that respects our heritage.

Respectfully Submitted,

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U.S. 203 (1997). History confirms the Archbishop is still held at bay.